Office - Supreme Court, U.S.
FILED
JUL 9 1982
ALEXANDER L. STEVAS,
CLERK

82-85

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1982

NO._____

MARTIN CAVALIER
Petitioner

VS.

T. SMITH & SON, INC., ET AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT AND APPENDICES

George J. Kambur
207 G. J. Kambur Building
809 North Broad Street
New Orleans, Louisiana,
70119
Counsel for Petitioner,
Martin Cavalier

QUESTIONS PRESENTED

1. Is the negligence of a seaman, who is using vessels gear and doing the vessels work the "negligence of a vessel" within the meaning of 905 (b) if that negligence harms a longshoreman when both the seaman and the longshoreman have the same employer.

SUBJECT INDEX

Page

TABLE OF CASES CITED---------- iii

TABLE OF STATUTES CITED---------- iv

TABLE OF OTHER AUTHORITY CITED---------- iv

OPINION----------1

JURISDICTION----------2

QUESTIONS PRESENTED----------2

STATUTORY PROVISIONS----------2

STATEMENT OF THE CASE----------3

REASONS FOR GRANTING WRIT----------4

SUMMARY OF ARGUMENT----------13

CONCLUSION----------14

APPENDIX "A"

Cavalier v. T. Smith & Son, Inc., et al
No. C. A. 78-342, U. S. D. C. Eastern District
of Louisiana
Fact Stipulations and Findings of Fact at Trial
of Cause ----------A-1

APPENDIX "B"

Cavalier v. T. Smith & Son, Inc., et al
No. C. A. 78-342, U.S.D.C. Eastern District
of Louisiana
Judgment----------A-15

APPENDIX "C"

Martin Cavalier v. T. Smith & Son, Inc., et als
Fifth Circuit Court of Appeal # 81-3143
Opinion----------A-17

Denial of Rehearing----------A--21

CERTIFICATE OF SERVICE----------36

TABLE OF CASES CITED

	Page
Fitzgerald v. Compania Naviera la Molinera 394 F. Supp. 402, 409 (E.D.La. 1974)	7
Gutierriz v. Waterman Steamship Corp 83 S. Ct. 1185 (1963)	5
Luckett v. Continental Engineering Co. 649 F.2d 441, 445 (6th Cir. 1981)	7
Offshore Co. v. Robison 266 F.2d 769 (5th Cir. 1959)	7
Reed v. The Yaka 83 S. Ct. 1349 (1963)	4
Scindia Steam Navigation Co., Ltd. v. Santos 101 U. S. 1614, 68 L.Ed. 2d 1 (1981)	12,13
Senko v. LaCrosse Dredging Corp. 352 U. S. 270 (1957)	7
Smith v. Eastern Seaboard Pile Driving Inc. 604 F.2d at 795 (1979)	10,11
Smith v. M/V Captain Fred 546 F2d 119, 123 (5th Cir. 1977)	12,13
Spiller v. Lowe 328 F. Supp. 54 (W.D. Ark.,1971)	7
Wilkes v. Miss. River Sand & Gravel Co. 202 F.2d 383, 388 (6th Cir. 1953)	7

page

TABLE OF STATUTES CITED

Longshoreman and Harbor Workers' Compensation Act § 5 §§ 905(b) ----------2,3,4,5, 6,8,9,10,11,12,13,14

28 U. S. C. 1254----------2

Longshoremen's and Harbor Workers' Compensation Act §§ 1-51,U.S. C. A. §§ 901-905-------4

TABLE OF OTHER AUTHORITY CITED

General Maritime Law----------13

"Admiralty" by Healy & Sharpe----------7

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1982

NO._____

MARTIN CAVALIER

Petitioner

VS.

T. SMITH & SON, INC., ET ALS

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Martin Cavalier, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeal, Fifth Circuit, entered in the above case, February 26, 1982, rehearing denied April 13, 1982.

OPINION BELOW

The opinion of the Court of Appeal, Fifth Circuit is reported 668 F.2d 861. The opinion of the District Court, Eastern District of Louisiana, is reported in 499 F. Supp. 650.

JURISDICTION

The jurisdiction of this Court is invoked uner 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Is the negligence of a seaman, who is using the vessels gear and doing the vessels work the "negligence of a vessel" within the meaning of 905 (b) if that negligence harms a longshoreman when both the seaman and the longshoreman have the same employer.

STATUTORY PROVISIONS

905 (b) of the Longshoreman and Harbor Workers' Act as amended 1972.

Sec. 5

"(b) In the event of injury to a person covered under this act caused by the neglgience of a vessel, then such person, or anyone entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this ACT, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under the subsection shall not be based on the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this ACT.

STATEMENT OF THE CASE

This case was decided by the Trial Court from fact stipulations and fact findings at the trial of the cause*. The Court, in written reasons granted judgment dismissing plaintiff/petitioner's case and held that plaintiff/petitioner, a longshoreman, was injured by the negligence of a seaman member of the crew of the vessel; nevertheless, plaintiff/petitioner's exclusive remedy against the defendant was under the Longshoreman and Harbor Workers' Compensation Act because a single company both owned the vessel and employed plaintiff/petitioner. The Court said in essence that although the injury was caused by a vessel's being used to carry out it's function, the use was superseded by the designation of that function as a longshoring operation. However, in an addendum to the findings of fact and conclusions of law, the trial court took notice that a review court would have a completely equivalent ability to resolve the issue. For judicial economy and in the interest of justice, the court stated that had plaintiff/petitioner prevailed and had a different conclusion as to liability been reached, the court would have awarded the following:

Past, present and future pain and suffering and permanent disability	$110,000.00
Medical and hospital expenses	3,460.72
Past, present and future wage loss	87,000.00
	$200,460.72

*See Appendix A for fact stipulations, findings of fact and conclusions of law of trial court.

On appeal to the Fifth Circuit Court of Appeals the Court found that:

"1. Worker's Compensation

Longshoreman injured by negligence of crew of vessel may sue owner of vessel even though owner is also his employer, liable to him for compensation under Longshoremen's and Harbor Worker's Compensation Act., §§1-51,33 U.S.C.A. §§901-950.

2. Workers' Compensation

Longshoreman's action for negligence of vessel owner was barred, where injury was caused by negligence of persons engaged in providing stevedoring services to vessel. Longshoreman's and Harbor Workers' Compensation Act.,§ 5 (b), 33 U. S. C. A. §§905(b)."

REASONS FOR GRANTING WRIT

1.Petitioner's case is based on principal, considered to be well settled, that the Yaka Rule survived the 905(b) amendment to the Longshoreman and Harbor Worker's Compensation Act.

In Reed v. The YAKA 83 S. Ct. 1349 (1963), the Supreme Court held that the economic burden of a longshoreman tort recovery must ultimately fall upon the party whose negligence or fault caused the injury.

Thus under the YAKA rule a longshoreman could sue a vessel owner who was also his compensation act employer in every case where the same vessel would be liable if not his employer and the fact that:

"There is no distinction in admiralty between torts committed by the ship's personnel while operating it, any more than there is between torts "committed" by a corporation and by its employees."

Gutierriz v. Waterman Steam-Ship Corp. 83 S. Ct. 1185 (1963)

Petitioner submits that the issue in this case is: Was it the intent of Congress in enacting § 905(b) to make a seaman-crewmember while using the vessel's appurtenances during the scope and course of his employment have a change in status and become a person engaged in providing stevedoring services to a vessel.

The narrow question raised herein for the attention of the Court is whether the exclusions of LHWCA § 905(b) includes the responsibility of a vessel owner for the negligence of the crew of a vessel to a longshoreman injured by them who was also employed by the vessel owner. This of course would insulate the seaman's vessel owner employer against a tort action by the employer's longshoreman-temporary employee from a separate division of a multi-faceted corporate enterprise. This situation raises the issue of a seaman's status and whether it is to be ignored once it has vested.

Counsel submits that the nature of the seaman-crew members' employment should establish their employer as liable in tort for their negligence in performing their duties as seamen.

This Court might consider the following analogies which a fortiori would seem to follow from the Fifth Circuit holding in this case.

When a fireboat owned by a multi-faceted company is extinguishing a fire aboard a vessel and the fireboat crew member stops directing a hose stream upon the vessel in distress and goes aboard the vessel to aid stevedores employed by the same multi-faceted company to remove cargo off the ship, has the seaman become a person engaged in longshoring activities should he negligently injure one of the longshoremen. Is his status as a seaman changed because his performance of a function of his vessel has entailed actions which may also be performed by a longshoreman?

Second, if a member of the crew of a flat-bottom vessel also owned by a multi-faceted company while unloading cargo off a ship which cannot navigate beyond jetties injure a stevedore employee of the same company, is the negligence of that crew member of the flat-bottom vessel which was to proceed some 50 miles upriver to an unloading port with cargo not a seaman of his vessel at that point in time but a person performing longshoring services?

Thus, even in this situation where the function of a vessel is to remove and transport cargo from one port to another while engaged in its function do it's crewmembers become persons engaged in longshoring operation and are exempt under § 905 (b) when they negligently injure a true longshoreman.

These analogies are plausible extensions of the

interpretation as set forth by the Fifth Circuit Court holding in this case. In opposing that holding, counsel respectfully argues that seamen have held a special status in the courts, and that status is not stripped away because of the nature of a particular task done while aboard or even on shore when in the service of the vessel. Baking bread in a sea-going vessel's gallery does not transform a seaman into a baker; painting a hull of a vessel does not transform the seaman into a painter. Seamen are still seamen when they are in automobiles or on land, depending on the facts present, according to admiralty casebook law. See "Admiralty", Healy and Sharpe. They need only be attached to their vessel.

The Fifth Circuit in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959) enunciated the breadth of the term "seaman": "Expansion of the terms "seaman"... are (sic) consistent with the liberal construction of the act." 266 F.2d at 780.

See, Senko v. LaCrosse Dredging Corp., 352 U. S. 270 (1957); Spiller v. Lowe, 328 F. Supp. 54 (W. D. Ark., 1971); Luckett v. Continental Engineering Co., 649 F. 2d 441, 445 (6th Cir. 1981). Also, the term was open to admit cooks, roughnecks, (Robison, supra) and other employees "whose duties contribute to the operation and welfare of the vessel." (Wilkes v. Miss. River Sand & Gravel Co., 202 F. 2d 383, 388 (6th Cir. 1953). This legislative intent and judicial elaboration thereof as to the special status of seamen is longstanding

over a period of many years. It is submitted that only by denying that status can the holding of the appellate court be affirmed so that in the instant case the seaman-crewmember tortfeasors were, in essence, fellow longshoremen of petitioner.

The Court's liberal construction of protective legislation granting rights to seamen and longshoremen is legion in American jurisprudence. Causes under the LHWCA and Jones Act are permitted by broad interpretation of the two legislative schemes.

While a "trade-off" in the amendment to the 1972 LHWCA is clearly intended in the master-servant relationship as to compensation of work-related injuries, nevertheless, the seaman and longshoreman have been held as "wards of the court" because of their relative weakness vis a vis maritime employers-entrepreneurs. When the courts allow redress of injuries under the two acts, they are affording a "small" plaintiff ways to be compensated. Petitioner contends that the same spirit in solicitude for the "small man's " redress should inspire interpretation of the acts, here the LHWCA, to allow as many as possible modes of recovery for an injury sustained in the maritime world.

In Fitzgerald v. Compania Naviera la Molinera, 394 F. Supp. 402, 409 (E. D. La. 1974) the court stated:

> "The suit against the vessel owner is not to be denied because the visual scheme of structuring the employment relationships along the waterfront is not followed."

The facts of the case at bar present to this Court

the interstice between the two acts (Jones Act and LHWCA). Congress has never expressed the intent to convert some seamen into longshoremen. Petitioner urges that this Court apply §905(b) to the facts before it, including the stipulation that the tortfeasors were seamen. Were the Patricia the vessel of a third party, its crewmen's acts would cause its owner to be liable to Cavalier, a longshoreman. The fortuity of being a multi-faceted corporation should not shield T. Smith from liability as an extra perquisite of corporate power. Rather the traditional juridical concern for the maritime worker should apply and allow an avenue of redress for a longshoreman to fill the blank space between the Acts.

Petitioner respectfully submits that the conclusion of the Fifth Circuit Court of Appeals that the seamen-crew members were acting as persons providing stevedoring services when Cavalier was injured is not a correct conclusion and infringes the status of seamen, opening the door to future litigation of such a premise by aggrieved seamen and longshoremen and should not be maintained by this Court.

This holding extends the Act in a direction which, if followed, will distort the Act to permit the following hypothetical yet plausible, logical conclusion: A seaman who has no claim for negligence and cannot recover in general maritime tort or under the Jones Act may claim coverage of LHWCA for his injury by a fellow seaman-crew member during the handling of cargo or stevedoring operations by their vessel. § 905(b) contains language: "If such person [claimant] was employed by the vessel

to provide stevedoring services...". Arguably the transformation of seamen into longshoremen, when benefits can accrue only by the above language, which does not exclude seamen.

Further, if there is actionable negligence of a fellow crew member such as would allow a seaman his Jones Act and/or maritime tort recovery, does the fact that the injury occurs during the handling of cargo preclude or deny the seaman his Jones Act and/or General Maritime tort recovery because both employees were engaged in "stevedoring services"?

Petitioner contends that the Patricia crew members were agents of their vessel at all times, according to jurisprudence defining seamen and were in fact stipulated to be seamen and members of the crew. The crane performed various maritime jobs, including pulling anchors, lifting equipment, etc. in addition to handling cargo. Petitioner respectfully submits that this Court reconsider the facts of the Cavalier case.

It is further respectfully submitted that the point which counsel is attempting to make in Cavalier is that a member of a crew of a vessel always act as the vessel owner's agent when he performs a function of vessel and it was not the intent of Congress in acting 905(b) to change its traditional concept.

> "4. The House Report states:
> The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused

> by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repair men as apply when a a independent contractor employs such persons. 3 U. S. Code Cong. & Admin. News, p. 4705 (1972)
>
> Smith vs. Eastern Seaboard Pile Driving Inc. 604 F.2d at 795 (1979)

Certainly, in the instant case if the derrick barge Patricia had been owned by a third party, unquestionably a 905 (b) action would lie. The negligent derrick operator crewmember of the Patricia would have been an agent of the shipowner, and Cavalier would have been an employee of the stevedore T. Smith & Son.

Further, throughout the circuits that have dealt with this problem the nexus seems to be that even though both parties were working at the same task would they have been employed normally by the same employer. This would not have been the cause under the facts of Cavalier without a large multi-faceted corporation. Longshoremen are employed daily from the Union Hall and vessel owners are a catagory in themselves and employ their crew permanently to man their vessel under fixed wages, vacation pay and different terms and conditions from that of employment of a longshoreman.

The Fifth Circuit Court of Appeals held however that the negligence of a member of the crew of a vessel were considered under 905 (b) to be providing stevedoring

services to a vessel even though they were carrying out one of the functions for which their vessel was specifically designed.

The Fifth Circuit Court of Appeal's ruling of February 26, 1982 is in conflict with the United States Supreme Court, Scindia Steam Navigation Co., Ltd. vs. Santos 101 U. S. 1614 68, L.Ed. 2d 1, 1981, when the United States Supreme Court said that"...the vessel may be liable (under 905 (b) if actually involved itself in cargo operation and negligently injuries a longshoreman or if it fails to exercise due care to avoid exposing longshoreman to harm from hazards they may encounter... from equipment under the active control of the vessel during stevedoring operations" and that the Fifth Circuit Court of Appeals ruling fails to recognize that longshoreman employed by the vessel is to be treated no differently than if the vessel had been owned by a third party . See, Smith v. M/V Captain Fred 546 F.2d 119, 123 (5th Cir. 1977).

The rationale of the ruling in the instant case would either deny a 905 (b) action when a vessel crewmember negligently injuries a longshoreman while assisting in longshore operations which would be contrary to Santos or would discriminate against a longshoreman employed by the vessel when he is injured by a seaman working for the same employer. The result reached in this case being contrary to the legislative history accorded 905(b) relief to longshoreman regardless of who owned the vessel for acts of negligence committed by the vessel crew members while assisting in longshoring as authorized

in Santos, supra is clearly wrong.

SUMMARY OF ARGUMENT

Plaintiff/Petitioner contends that he was injured through the negligence of a vessel, the derrick barge Patricia because of actionable errors committed by members of the crew who were seamen permanently assigned to the vessel. At the time of the injury the crewmen were carrying out the function for which the vessel was designed. The fact that the derrick barge was using its permanently fixed crane to facilitate removal of heavy cargo from a ship does not take away the responsibility of the vessel owner for the negligence of the vessel through the action of its crew.

Plaintiff/Petitioner submits that the ownership of a vessel by a multidivision large corporation which also employs traditional longshore gangs in another division does not lessen the legal responsibilities and obligations of that corporate vessel owner to answer for the negligence of members of the crew of its vessel during the carrying out of the function of the vessel.

Therefore, petitioner contends that he has a valid action against the defendants under 33 U. S. C. A. 905(b) in that petitioner's injuries were caused by a vessel through the negligence of members of its crew.

Thus it would follow that there is jurisdiction and a cause of action in the instant case under the General Maritime Law of the United States and any other applicable Federal and/or State statute including Section

905 (b) of the LHWCA as amended in 1972.

CONCLUSION

For the reasons set forth above, Petitioner prays that a writ of certiorari be granted, and that, upon due proceedings had, the judgment of the Court of Appeal, Fifth Circuit, be reversed, that T. Smith & Son, Inc. be held liable to petitioner under applicable law, or that this case be remanded for further proceedings in accordance with applicable law.

Respectfully submitted,

George J. Kambur
207 G. J.Kambur Building
809 North Broad Street
New Orleans, Louisiana, 70119
Counsel for Petitioner,
Martin Cavalier